



DEPARTMENT OF THE ARMY
OFFICE OF THE GENERAL COUNSEL
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Adam Ashton
The News Tribune
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Hal Bernton
The Seattle Times
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Dear Mr. Ashton and Mr. Bernton:

This letter responds to your Freedom of Information Act (FOIA) appeal dated January 15, 2013. The Office of the Administrative Assistant to the Secretary of the Army (OAA) denied your request for the AR 15-6 investigations concerning Madigan Army Medical Center.

We apologize for the delay in our responding to your appeal. The Army must address a large volume of FOIA demands, and we cannot always respond to appeals as quickly as we would like. We make it our practice to respond to appeals in the order received. The courts have sanctioned this method of handling FOIA cases. *Open America v. Watergate Special Prosecution Force*, 547 F.2d 605, 614-16 (D.C. Cir. 1976).

OAA withheld the documents under Exemption 5 of the FOIA. 5 U.S.C. § 552(b)(5). After a careful review of the issues presented in your appeal, we have determined that the information you requested was properly withheld under this exemption. Accordingly, your appeal is denied.

Exemption 5 of the FOIA protects from disclosure intra-agency and inter-agency memoranda that would not be available to a party other than an agency in litigation with the agency. 5 U.S.C. § 552(b)(5). OAA withheld the AR 15-6 investigations under the "deliberative process privilege." There are three purposes that constitute the bases for this privilege: 1) to encourage frank and open discussions on matters of agency policy; 2) to protect against premature disclosure of proposed policies before they are adopted; and 3) to protect against public confusion that might result from disclosure of reasons and rationales that were not in fact the grounds for an agency's actions. A District of Columbia Circuit Court decision explains when deliberative process information should be withheld. The material must be both pre-decisional and deliberative. *Mapother v. Department of Justice*, 3 F.3d 1533, 1537 (D.C. Cir. 1993).

"Pre-decisional information" includes intra-agency or inter-agency communications between subordinates and superiors that are antecedent to the

adoption of agency policy. *Jordan v. Department of Justice*, 591 F.2d 753 (D.C. Cir. 1978). Courts have established a low threshold for agencies in the determination of whether a document is pre-decisional. The agency must merely state what deliberative process is involved and the role played by the documents in that process. *Coastal States Gas Corp v. Department of Energy*, 617 F.2d 854, 868 (D.C. Cir. 1980). A document will be considered deliberative in nature if it has been a direct part of the deliberative process—that is, if it “makes recommendations or expresses opinions on legal or policy matters.” *Vaughn v. Rosen*, 523 F.2d 1136, 1143-44 (D.C. Cir. 1975).

Here, the documents are both pre-decisional and deliberative in nature because the Secretary of the Army tasked the Army Behavioral Health Task Force to investigate the matter and develop a corrective action plan. Thus, the documents were generated as part of a continuing process of agency decision-making, and they were properly withheld under Exemption 5.

This letter constitutes final action on behalf of the General Counsel, who has been designated by the Secretary of the Army to consider appeals under the FOIA. You may, if you so desire, seek judicial review of this determination in the federal court system in accordance with the FOIA, 5 U.S.C. § 552(a)(4)(B).

Sincerely,

A handwritten signature in black ink, appearing to read "Ronald J. Buchholz", written in a cursive style.

Ronald J. Buchholz
Associate Deputy General Counsel